No._____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988 ____

DONALD R. LEGO, Petitioner

-vs-

PEOPLE OF THE STATE OF ILLINOIS, Respondent

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF ILLINOIS

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QUESTION PRESENTED FOR REVIEW

Whether the retroactivity standard announced in Griffith v. Kentucky, 479 U.S. ___, 93 L.Ed.2d 649 (1987), which abolished the "clear break" exception to retroactive application of new constitutional rules to cases pending on direct review, is binding on the Illinois Supreme Court, and required that court to retroactively apply its ruling in People v. Zehr, 103 Ill.2d 472, 409 N.E.2d 1362 (1984) to Petitioner's direct appeal, and hold that the refusal to question prospective jurors on the presumption of innocence deprived Petitioner of his constitutional right to an impartial jury.

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CERTIORARI SHOULD BE GRANTED TO RESOLVE A SIGNIFICANT CONSTITUTIONAL ISSUE NOT PREVIOUSLY ADDRESSED BY THIS COURT AND UPON WHICH STATE COURTS ARE IN DISAGREEMENT; THAT IS, WHETHER A STATE COURT, WHICH RENDERS A DECISION ESTABLISHING A NEW FEDERAL CONSTITUTIONAL RULE ON AN ISSUE NOT SPECIFICALLY ADDRESSED BY ANY PRIOR DECISIONS OF THIS COURT, IS BOUND TO APPLY THIS COURT'S RETROACTIVITY STANDARDS IN DETERMINING THE RETROACTIVITY OF THAT NEW RULE

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PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF ILLINOIS

The petitioner, DONALD R. LEGO, prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Illinois which held that Mr. Lego was properly convicted of the offense of murder and sentenced to death.

OPINION BELOW

The opinion of the Supreme Court of Illinois appears at 116 Ill.2d 323, 507 N.E.2d 800 (1987). A copy of the opinion is attached to this petition as Appendix A.

The orders of that court denying a petition for rehearing are not reported. Copies of those order are attached as Appendices B, C and D.

JURISDICTION

The judgment of the Supreme Court of Illinois was entered on February 20, 1987. (Appendix A) A petition for rehearing was denied on June 5, 1987. (Appendix B) The order denying rehearing was, however, vacated on August 6, 1987. (Appendix C) Rehearing

was finally denied on June 27, 1988 (Appendix D). This petition is being filed within sixty days of the Illinois Supreme Court's final denial of rehearing. The jurisdiction of the Court is invoked under 28 U.S.C. sec. 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Article VI, Clause 2 of the Constitution of the United States (the Supremacy Clause) provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Sixth Amendment to the Constitution of the United States provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury...

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> No State shall...deprive any person of life, liberty, or property, without due process of law...

STATEMENT OF THE CASE

Petitioner Donald R. Lego was convicted by jury of the murder of Mary Mae Johnson during the commission of a burglary and armed robbery. At the request of the State, a death penalty hearing was held. The jury unanimously found the existence of a statutory aggravating factor and found that there were no mitigating factors sufficient to preclude a sentence of death. The trial court sentenced Petitioner to death.

Prior to trial, the Petitioner, who represented himself pro - se (with appointed "stand-by" counsel in the courtroom) submitted six questions which he requested the trial court to propound to prospective jurors during voir dire. Included among those questions was whether the jurors "believe(d) in a presumption of innocence as it applied to a person charged with a crime." (Report of Proceedings at 1094-95). The trial court refused to submit the question, explaining:

> As far as the presumption of innocence is concerned, in my initial charge to a jury, I advise them there is a presumption of innocence that remains with the Defendant throughout the case and during the deliberations of the jury on its verdict, and it is not overcome unless they believe from the evidence, beyond a reasonable doubt,that the Defendant is guilty, and having told them that and having told them their obligation to follow the law as I state it to be, and that would include a statement by the Court and the instruction that there is such a presumption of innocence, that it governs the deliberations in the case. I don't see any need to query each individual juror on the point. (Report of Proceedings at 1099-1100).

In his direct appeal to the Illinois Supreme Court, the Petitioner argued that the trial court's refusal to specifically inquire into each prospective juror's views on the presumption of innocence had deprived him of the right to a fair and impartial jury. In support of this contention, Petitioner relied upon People v. Zehr, 103 Ill. 2d 472, 469 N.E.2d 1062 (1984), a decision rendered subsequent to Petitioner's trial, in which the Illinois Supreme Court had held that the refusal to question prospective jurors on their views of the presumption of innocence deprived criminal defendants of their right to a fair and impartial jury. 469 N.E.2d at 1064.

In Petitioner's appeal, however, the Illinois Supreme Court rejected the claim of error. Noting that its decision in People v. Zehr was rendered after Petitioner's trial, the court refused to apply Zehr retroactively to Petitioner's case as "the holding in Zehr represented a change in Illinois law." People v. Lego, 116 Ill.2d 323, 507 N.E.2d 800, 805 (1987).

In dissent, Illinois Supreme Court Justice Simon expressed the view that under this Court's opinion in Griffith v. Kentucky, 479 U.S. ___, 93 L.Ed.2d 649 (1987), the Illinois Supreme Court was obliged to apply its decision in People v. Zehr retroactively to Petitioner's case. Justice Simon observed that in Griffith, this Court had reexamined its retroactivity jurisprudence and concluded that new constitutional principles should be applied retroactively to cases pending on direct review, even when such a principle constitutes a "clear break" from prior law. People v.

Lego, 116 Ill.2d 323, 507 N.E.2d 800, 813 (1987) (Simon, J., dissenting).

Petitioner sought rehearing in which he urged the Illinois Supreme Court, in light of Griffith v. Kentucky, 479 U.S. ___, 93 L.Ed.2d 649 (1987), to reconsider its refusal to apply the new constitutional rule announced in People v. Zehr retroactively to his direct appeal. Rehearing, however, was denied.

REASON FOR GRANTING CERTIORARI

CERTIORARI SHOULD BE GRANTED TO RESOLVE A SIGNIFICANT CONSTITUTIONAL ISSUE NOT PREVIOUSLY ADDRESSED BY THIS COURT AND UPON WHICH STATE COURTS ARE IN DISAGREEMENT; THAT IS, WHETHER A STATE COURT, WHICH RENDERS A DECISION ESTABLISHING A NEW FEDERAL CONSTITUTIONAL RULE ON AN ISSUE NOT SPECIFICALLY ADDRESSED BY ANY PRIOR DECISIONS OF THIS COURT, IS BOUND TO APPLY THIS COURT'S RETROACTIVITY STANDARDS IN DETERMINING THE RETROACTIVITY OF THAT NEW RULE

Since Linkletter v. Walker, 381 U.S. 618 (1965), this Court's announcement of a new constitutional rule governing criminal procedure has frequently been followed by a separate decision explaining whether, and to what extent, that rule will be applied retroactively. See generally Beytagh, Ten Years of Non-Retroactivity: A Critique and a Proposal, 61 Va.L. Rev. 1557 (1975). Prior to Linkletter, both the common law and the holdings of this Court had required that all constitutional decisions receive full retroactive application. In Linkletter, however, this Court concluded "that the Constitution neither prohibits nor requires [that] retrospective effect" be given to any new constitutional rule, and that a determination of retroactivity must depend upon "weigh[ing] the merits and demerits of each case." 381 U.S. at 629. The factors to be weighed in each case included "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." Stovall v. Denno, 388 U.S. 293, 297 (1967). For purposes of applying these three factors, no distinction was made between convictions that

were final and those that were pending at various stages of trial and direct review. Stovall, 388 U.S. at 300.

In United States v. Johnson, 457 U.S. 537 (1982), however, this Court concluded that the retroactivity analysis for convictions that had become final must be different from the analysis for convictions that were not final at the time the new decision was announced. In Johnson, and later in Shea v. Louisiana, 470 U.S. 51 (1985), this Court held that a decision establishing a new constitutional rule was to be applied retroactively to all convictions that were not yet final at the time the decision was rendered, except where the new rule constituted a "clear break" with past precedent. Johnson, 457 U.S. at 549-550; Shea, 470 U.S. at 59.

In Shea, this Court expressed some doubt about the merits of the "clear break" exception to retroactivity, but did not reach the issue. Two years later, however, in Griffith v. Kentucky, 479 U.S. ___, 93 L.Ed.2d 649 (1987), this Court concluded that maintenance of the "clear break" exception, which had resulted in the failure in some cases to apply a newly declared constitutional rule to all cases pending on direct review, "violates basic norms of constitutional adjudication". 93 L.Ed.2d at 658. The Court in Griffith therefore held that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past". 93 L.Ed.2d at 661.

It is well established that when this Court renders a decision announcing a new constitutional rule, the scope of retroactivity to be accorded that decision by state courts is controlled by the retroactivity principles established by this Court. See Griffith v. Kentucky, 479 U.S. ___, 93 L.Ed.2d 649, 658 (1987); Daniels v. Louisiana, 420 U.S. 31, 32 (1975); Tehan v. United States ex rel. Shott, 382 U.S. 406, 409 n.3 (1966). This Court, however, is not the only court to rule on federal constitutional issues. Under the Supremacy Clause, state courts share equally in that responsibility. United States Const., Art. VI, Cl.2; Stone v. Powell, 428 U.S. 465, 493 (1976); Public Service Commission of Utah v. Wycoff, 344 U.S. 237, 247-248 (1952). As a result, it is a relatively common occurrence for a state court to render a decision announcing a new federal constitutional rule to govern criminal trial procedures in that state. And, like this Court, that state court must later determine the scope of retroactivity to be accorded that new federal constitutional rule.

This Court has never addressed the question of what principles control the retroactivity of state court decisions which announce new federal constitutional rules. If a state supreme court renders a decision which establishes a new federal constitutional rule on an issue not specifically addressed by any prior decision of this Court, is that state court bound by the retroactivity principles established by this Court for constitutional cases, or is that state court free to establish its own retroactivity standards?

Because many state courts simply apply this Court's established principles to their own retroactivity cases without discussing whether they are bound to do so, there is not an abundance of authority on the issue. Those state courts which have addressed the issue, however, are in sharp disagreement. Compare State v. O'Coin, 417 A.2d 310 (R.I. 1980) and State v. Raskin, 30 Wis. 2d 39, 139 N.W.2d 667 (1966) with Commonwealth v. McFeely, 509 Pa. 394, 502 A.2d 167 (1985) and Waits v. People, 724 P.2d 1329 (Colo. 1983).

In State v. O'Coin, 417 A.2d 310 (R.I. 1980) the Rhode Island Supreme Court determined the retroactivity of its earlier decision in State v. Jenison, 122 R.I. 142, 405 A.2d 3 (1979), holding that the exclusion of members of the university academic community from grand jury service violated the due process clause of the Fourteenth Amendment. In making this determination, the court recognized that "the retroactivity of Jenison, a decision based on federal constitutional law, must be determined in compliance with federal law governing retroactivity." 417 A.2d at 312.

Similarly, in State v. Raskin, 30 Wis. 2d 39, 139 N.W.2d 667 (1966), the Wisconsin Supreme Court faced the issue of the retroactivity to be accorded State ex rel White v. Simpson, 28 Wis. 2d 590, 137 N.W.2d 391 (1965), in which it had held that issuance of an arrest warrant by a local prosecutor violated the Fourth Amendment. The Raskin court noted that in determining the retroactivity of White, which was concerned with federal

constitutional guarantees, it was "bound by the decisions thereon by the United States Supreme Court." 139 N.W.2d at 673.

In contrast, the Pennsylvania Supreme Court in Commonwealth v. McFeely, 509 Pa. 394, 502 A.2d 167 (1985), faced with deciding the retroactivity of Commonwealth v. Williams, 483 Pa. 293, 396 A.2d 1177 (1978), in which it had held that a warrantless arrest made in the arrestee's home, absent exigent circumstances, violated the Fourth Amendment, stated that it was "not bound" by this Court's retroactivity standards. 502 A.2d at 169. Therefore, although this Court had earlier decided in United States v. Johnson, 457 U.S. 537 (1982), that Fourth Amendment issues were retroactive to cases pending on direct review, the Pennsylvania Supreme court in McFeely, "decline(d) to adopt the view" of this Court in Johnson and instead applied the three-factor balancing test of Stovall v. Denno, 388 U.S. 293 (1967), which this Court had explicitly abandoned in Johnson. McFeely, 502 A.2d at 169-170.

Similarly, the Colorado Supreme Court has made clear that it does not feel bound by this Court's retroactivity cases. In Waits v. People, 724 P.2d 1329 (Colo. 1986), the court faced the issue of the retroactivity of People v. Thomas, 660 P.2d 1272 (Colo. 1983), in which it had held that an investigatory stop of an automobile based solely on evasive maneuvers to avoid police contact violated the Fourth Amendment. The Colorado Supreme Court in Waits stated that while it had "followed the lead" of this Court in determining the retroactivity of a new rule of criminal procedure, "on Fourth Amendment questions we have not

chosen between the retroactivity analysis set forth in Stovall v. Denno, 388 U.S. 293 (1967), and the 'bright line' approach announced later in United States v. Johnson, 457 U.S. 537 (1982)." Waits, 724 P.2d at 1335 (emphasis added).

The case at bar presents this Court with the opportunity to resolve this conflict among state courts of last resort on the question of whether those courts, in rendering decisions which establish new federal constitutional rules on issues not specifically addressed by any prior decision of this Court, are nevertheless bound to follow this Court's retroactivity standards in determining the retroactivity of those new rules.

A criminal defendant in a state court proceeding is guaranteed an impartial jury by the Sixth Amendment as applied to the states through the Fourteenth Amendment. Duncan v. Louisiana, 391 U.S. 145 (1968). In People v. Zehr, 103 Ill.2d 472, 469 N.E.2d 1062 (1984), the Illinois Supreme Court held that it was essential to the selection of an impartial jury that prospective jurors be questioned during voir dire on their views of the presumption of innocence accorded criminal defendants.

This Court has never specifically addressed the issue decided in Zehr. In Rosales-Lopez v. United States, 451 U.S. 182, 188 (1981), this Court did recognize, however, that "(v)oir dire plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored." This Court has also recognized that while trial courts have broad discretion over the questions to be put to prospective jurors during voir dire [Smith v. United States, 431 U.S. 291,

308 (1977); Aldridge v. United States, 283 U.S. 308, 310 (1931)], there are, nevertheless, certain subject matters which must be addressed in voir dire to meet constitutional requirements. See Ristiano v. Ross, 424 U.S. 589 (1970)(prospective jurors must be questioned on racial bias where the facts of a particular case indicate that such bias is likely to affect the jurors); Turner v. Murray, 476 U.S. ___, 90 L.Ed.2d 27 (1986) (prospective jurors must be questioned on racial bias in a capital case involving an interracial crime)*

The Petitioner here requested that the trial court in his case question prospective jurors during voir dire on their belief in the presumption of innocence accorded to criminal defendants. The trial court refused to do so. In his direct appeal to the Illinois Supreme Court, relying on People v. Zehr, 103 Ill.2d

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*Whether prospective jurors must be questioned on their view of the presumption of innocence has been addressed by a number of state and federal courts, which have reached conflicting conclusions. Compare United States v. Hill, 738 F.2d 152 (6th Cir. 1984); State v. Cere, 125 N.H. 421, 480 A.2d 195 (1984); People v. Zehr, 103 Ill.2d 472, 469 N.E.2d 1062 (1984); Jones v. State, 378 So. 2d 797 (Fla. App. 1979) (holding that jurors must be questioned on the presumption of innocence) with United States v. Gillette, 383 F.2d 843 (2nd Cir. 1967); United States v. Wooten, 518 F.2d 943 (3rd Cir. 1975), cert. denied, 423 U.S. 895 (1975); United States v. Robinson, 804 F.2d 280 (4th Cir. 1986); United States v. Ledee, 549 F.2d 990 (5th Cir. 1977), cert. denied 434 U.S. 902 (1977); United States v. Price, 577 F.2d 1356 (9th Cir. 1978), cert denied, 439 U.S. 1068 (1979); Grandsinger v. United States, 332 F.2d 80 (10th Cir. 1964); United States v. Miller, 758 F.2d 570 (11th Cir. 1985), cert denied ___ U.S. ___, 88 L.Ed.2d 357 (1985); State v. Dahlgren, 200 Conn. 586, 512 A.2d 906 (1986); Commonwealth v. Rhodes, 379 Mass. 810, 401 N.E.2d 342 (1980); Commonwealth v. Kingsley, 480 Pa. 560, 391 A.2d 1027 (1978) (holding that there is no requirement that jurors be questioned on the presumption of innocence).

472, 469 N.E.2d 1062 (1984), Petitioner claimed that this refusal violated his constitutional right to an impartial jury. The Illinois Supreme Court however, over the dissent of Justice Simon, held that its decision in Zehr would not be applied retroactively to Petitioner's case because Zehr "represented a change in Illinois law." People v. Lego, 116 Ill.2d 323, 507 N.E.2d 800, 805 (1987). In dissent, Justice Simon recognized that the opinion of the Illinois Supreme Court in Petitioner's case was in conflict with this Court's decision in Griffith v. Kentucky, 479 U.S. ___, 93 L.Ed2d 649 (1987), which held that a new constitutional rule for the conduct of criminal prosecutions is to be applied retroactively to all cases pending on direct review, with no exception for cases in which the new rule constitutes a "clear break" from prior law. People v. Lego, 116 Ill.2d 323, 507 N.E.2d 800, 813 (1987). (Simon, J., dissenting).

As Justice Simon found below, the Illinois Supreme Court erred in failing to apply the retroactivity standard announced in Griffith v. Kentucky to Petitioner's case. Under the Supremacy Clause (United States Constitution, Art. VI, Cl. 2) decisions of this Court on matters of federal constitutional law are binding on state courts. Sims v. Georgia, 385 U.S.538, 543-544 (1967); South Carolina v. Bailey, 289 U.S. 412, 420 (1932).

It is true that "the Constitution neither prohibits nor requires [that] retrospective effect" be given to any "new" constitutional rule. United States v. Johnson, 457 U.S. 537, 542 (1982), citing Linkletter v. Walker, 381 U.S. 618, 629 (1965). It is also true, however, that the Constitution neither prohibits

nor requires the exclusion of illegally seized evidence. See United States v. Leon, 468 U.S. 897, 906 (1984). The exclusionary rule is simply "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the person aggrieved." United States v. Calandra, 414 U.S. 338, 348 (1974). Nevertheless, the circumstances under which the federal exclusionary rule must be applied by state courts are defined by the decisions of this court, which are binding on state courts. See Mapp v. Ohio, 367 U.S. 643, 655 (1961).

Similarly, there is nothing in the Constitution which mandates a particular standard for determining the validity of a waiver of constitutional rights or for adjudging when a constitutional violation may constitute harmless error. Nevertheless, states courts are bound by the standards set by this Court on matters of waiver of federal constitutional rights and the harmlessness of federal constitutional errors. See Brookhart v. Janis, 384 U.S. 1, 4 (1966); Chapman v. California, 386 U.S. 18, 20-21 (1967).

Like issues regarding the exclusion of illegally seized evidence, the waiver of constitutional rights, and the harmlessness of constitutional error, issues regarding the retroactivity of new federal constitutional rules involve "basis norms of constitutioral adjudication." Griffith v. Kentucky, 479 U.S. ___, 93 L.Ed.2d 649, 658 (1987). Those constitutional norms should be established by this Court, and, under the Supremacy Clause, be held to be binding on the state courts.

This Court should grant certiorari in this case, reverse the judgment of the Illinois Supreme Court, and hold that a state court which renders a decision establishing a new federal constitutional rule is bound to apply this Court's retroactivity standards in determining the scope of retroactivity of that new rule.

CONCLUSION

For the foregoing reasons, Donald R. Lego, Petitioner, respectfully asks that a writ of certiorari be issued to the Supreme Court of Illinois.

Respectfully submitted,

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116 Ill.2d 323

The PEOPLE of the State of Illinois, Appellee,

v.

Donald R. LEGO, Appellant.

No. 59966.

Supreme Court of Illinois.

Feb. 20, 1987.

Rehearing Denied June 5, 1987.

Defendant was convicted of murder, of burglary with intent to commit murder, of burglary with intent to commit theft, and of armed robbery by the Circuit Court, Will County, Michael A. Orenic, J., and he appealed. The Supreme Court, Goldenhersh, J., held that: (1) denial of defendant's motion for change of venue based on extensive pretrial publicity did not deprive him of fair and impartial jury, though three jurors admitted on voir dire to having heard about case through media; (2) verbatim statements of witnesses obtained by defendant's investigators did not fall in scope of protection afforded by work-product rule; (3) failure to hold bifurcated sentencing hearing was not prejudicially erroneous; (4) prosecutor's remarks at sentencing hearing, that death sentence alone would be consistent with jurors' dignity and their personal commitment to law, were not so highly prejudicial as to require new sentencing hearing; and (5) Illinois Pattern Jury Instruction given at sentencing hearing, that juror should not allow either sympathy or prejudice to influence them, did not preclude jurors from considering any relevant mitigating factors in violation of defendant's Eighth and Fourteenth Amendment rights.

Affirmed in part and vacated in part.

Simon, J., dissented and filed opinion.

1. Criminal Law ⇐1126(1)

Denial of defendant's motion for change of venue based on extensive pretrial publicity did not deprive him of trial by fair and impartial jury, though three jurors admitted during voir dire to having heard of case through media, where defendant did not challenge jurors, jurors indicated that they could render impartial verdict based on law and evidence, and trial court repeatedly admonished jurors to avoid media coverage of trial and to avoid discussing case among themselves or with others.

2. Criminal Law ⇐1149
Indictment and Information ⇐121.1(3)

Whether state should be required to furnish defendant with bill of particulars is matter committed to sound discretion of trial court, and trial court's decision will be reversed only for clear abuse of discretion.

3. Indictment and Information ⇐121.1(1)

Purpose of bill of particulars is to adequately inform defendant of nature of accusation against him.

4. Indictment and Information ⇐121.2(1)

Denial of defendant's motion for bill of particulars alleging time, date, and instrument used in crime was not abuse of discretion, where defendant failed to explain how denial of motion impeded preparation of defense.

5. Witnesses ⇐8

Pretrial subpoena should not be used as discovery tool.

6. Courts ⇐100(1)

State Supreme Court case, holding that trial court must allow defendant to question prospective jurors about whether they accept presumption of innocence, would not be applied retroactively.

7. Witnesses ⇐306

Constitutional privilege against self-incrimination was personal to defendant and did not extend to statements of third party witnesses taken by defendant's investigators. U.S.C.A. Const.Amend. 5.

8. Criminal Law ⇐627.5(6)

Verbatim statements of witnesses obtained by defendant's investigators did not fall within scope of work-product rule.

9. Constitutional Law ⇐266(3.3)

Defendant was not denied due process rights by suggestive identification proce-

22. Homicide ⇐351

Death penalty statute provided adequate guidelines to distinguish those persons convicted of murder and eligible for death under Criminal Code from those persons convicted of murder and eligible for sentencing under Unified Code of Corrections. S.H.A. ch. 38, ¶¶ 9–1(b) et seq., 1005–1–1 et seq.

Neil F. Hartigan, Atty. Gen., Roma J. Stewart, Sol. Gen., Mark L. Rotert, Asst. Atty. Gen., Jack Donatelli, Asst. Atty. Gen., Chicago, for appellee.

Charles M. Schiedel, Deputy State Appellate Defender, Springfield, Lawrence J. Easig, Asst. Defender, Robert E. Davison, First Asst. State Appellate Defender, for appellant.

Justice GOLDENHERSH delivered the opinion of the court:

In a four-count indictment returned in the circuit court of Will County, defendant, Donald Richard Lego, was charged with the murder of Mary Mae Johnson by stabbing and besting her (Ill.Rev.Stat.1981, ch. 38, par. 9–1(a)(1)), and while committing the forcible felonies of burglary with intent to commit murder (Ill.Rev.Stat.1981, ch. 38, par. 9–1(a)(3)), burglary with intent to commit theft (Ill.Rev.Stat.1981, ch. 38, par. 9–1(a)(3)), and armed robbery (Ill.Rev.Stat. 1981, ch. 38, par. 9–1(a)(3)). Following a jury trial, verdicts were returned finding defendant guilty on all counts. Pursuant to section 9–1 of the Criminal Code of 1961 (Ill.Rev.Stat.1983, ch. 38, par. 9–1), at the request of the People, a death penalty hearing was held before the same jury. The jury unanimously found the existence of an aggravating factor set forth in section 9–1(b) (Ill.Rev.Stat.1981, ch. 38, par. 9–1(b)), and found that there were no mitigating factors sufficient to preclude a sentence of death. Defendant was sentenced to death on all four counts of murder. The sentence was stayed (87 Ill.2d R. 609(a)) pending appeal to this court (Ill. Const.1970, art. VI, sec. 4(b); 87 Ill.2d R. 603).

On August 25, 1983, Mary Mae Johnson, an 82-year-old widow, was found dead in her home in Joliet. She had been stabbed repeatedly and bludgeoned. A basement window and window well had been broken. Recovered at the victim's home were a white shirt similar to the one worn by defendant in a photograph taken earlier on the morning of the murder; a hand-rolled cigarette, cigarette filter, and a cigarette butt which, a forensic serologist stated, "evidenced" an O-type secreter, the same type as defendant; an envelope bearing defendant's name and address and containing photographs of defendant's family. A forensic scientist testified that fingerprints found on the door knob, the photographs in the envelope, and on the hand-rolled cigarette, compared to defendant's. The victim's son testified that money which she kept in a bag in her upstairs closet was missing. There was testimony at trial that defendant had done roofing work for Mrs. Johnson some three or four years earlier, for which she paid him $2,000 to $5,000 in cash.

[1] Defendant contends first that the circuit court's denial of his motion to change venue based on extensive adverse pretrial media coverage deprived him of a trial by a fair and impartial jury. He contends that because three of the jurors admitted during *voir dire* to having heard about the case through the media, and because the trial court failed to mitigate the effects of this potentially prejudicial publicity, he did not receive a trial by an impartial jury free from outside influences. (*Nebraska Press Association v. Stuart* (1976), 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683; *Irvin v. Dowd* (1961), 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751.) Citing *People v. Taylor* (1984), 101 Ill.2d 377, 78 Ill.Dec. 359, 462 N.E.2d 478, defendant argues, too, that the jurors' assertions that they had formed no opinion as to the guilt or innocence of defendant are not controlling and that the evidence of the "peculiar nature" of the publicized material showed that it was inherently prejudicial to defendant's case.

The People respond that defendant has not pinpointed a single specific instance of

enunciated in *Speck* and *Gacy*, we conclude that, although the crime was of a sensational nature and the publicity extensive, defendant received a trial from a fair and impartial jury. Our conclusion that the jury was not prejudiced finds further support, in that the record shows that the circuit court repeatedly admonished the jurors to avoid media coverage of the trial and to avoid discussing the case among themselves or with others.

We have considered defendant's contentions in the light of the additional authorities filed after leave given to supplement his brief. We have examined *Coleman v. Kemp* (11th Cir.1985), 778 F.2d 1487, and find it clearly distinguishable. In *Coleman*, the conviction arose out of an occurrence in which five members of a farm family were murdered and another raped and murdered. More than 40 pages of the reported opinion are devoted to describing the comments, primarily newspaper articles, disseminated over a period of months. The court, citing *Rideau v. Louisiana* (1963), 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663, held that the plaintiff had adduced evidence sufficient to meet "the extremely high standard necessary for a successful claim of presumed prejudice." (*Coleman v. Kemp* (11th Cir.1985), 778 F.2d 1487, 1543.) The evidence here falls far short of meeting the "extremely high standard."

We consider next defendant's contention that the circuit court's denial of his motion for a bill of particulars and of his request for the issuance of subpoenas precluded his adequately preparing his defense, thus violating his rights under the sixth and fourteenth amendments of the United States Constitution. In his motion for a bill of particulars, defendant requested information regarding the date and time of the offense and the instrument used to commit the crime.

[2-4] We agree with the People that the resolution of the question whether the People should be required to furnish defendant a bill of particulars is within the sound discretion of the circuit court. (*People v. Curtis* (1968), 41 Ill.2d 147, 148, 242 N.E.2d 201.) Only where there has been a clear abuse of discretion will the denial of a motion for a bill of particulars be held to be error. (*People v. Trukas* (1950), 406 Ill. 613, 617, 94 N.E.2d 895.) The purpose of a bill of particulars is to adequately inform the defendant of the nature of the accusation against him. (*People v. Curtis* (1968), 41 Ill.2d 147, 148, 242 N.E.2d 201.) "[W]here an indictment sufficiently informs the defendant of the offense charged against him there is no need for a bill of particulars * * *." (*People v. Trukas* (1950), 406 Ill. 613, 616-17, 94 N.E.2d 895.) We hold that the indictment sufficiently informed defendant of the offense with which he was charged; and denial of the motion for a bill of particulars alleging the time, date, and instrument used in the crime was not error. We note that defendant has failed to explain in what manner the denial of the motion impeded his preparation of his defense.

[5] Defendant also contends he was precluded from adequately preparing his defense because the circuit court quashed 89 pretrial subpoenas. Among those subpoenaed were 25% of the personnel of the Will County sheriff's office, a person identified only by the name "Charles," and unnamed members of the Chicago press. Defendant has not stated in what manner the quashing of the subpoenas impeded the preparation of his defense, and the apparent indiscriminate choice of persons to subpoena would support the conclusion that defendant was attempting to use subpoena service as a discovery tool. The use of subpoenas to ensure the attendance of witnesses is an important part of our system of jurisprudence, but it exists constitutionally and statutorily independent of our discovery rules. Defendant has failed to show that the witnesses desired were material to his defense, and their testimonies relevant. (*People v. Robinson* (1961), 22 Ill.2d 162, 170, 174 N.E.2d 820, *cert. denied* (1961), 368 U.S. 857, 82 S.Ct. 97, 7 L.Ed.2d 55.) Appropriate discovery procedures were available to defendant, and we hold that the circuit court did not err in quashing the subpoenas.

here. Do you recognize this gentleman here?

THE WITNESS: Yes, I do, now.

MR. LECHWAR: Q. Do you know who that is?

A. Yes.

Q. Would you state for the record what this gentleman's name is?

A. Donald Lego."

The authorities cited by defendant for the proposition that unnecessarily suggestive and conducive identification procedures lead to irreparable mistaken identification and denial of due process are inapplicable because they involve allegedly suggestive pretrial identification procedures and their possible taint upon later in-court identification. (*People v. McTush* (1980), 81 Ill.2d 513, 43 Ill.Dec. 728, 410 N.E.2d 861; *People v. Lee* (1973), 54 Ill.2d 111, 295 N.E.2d 449; *People v. Blumenshine* (1969), 42 Ill.2d 508, 250 N.E.2d 152.) In *People v. King* (1973), 54 Ill.2d 291, 296 N.E.2d 731, an in-court identification of the defendant, at least as suggestive as the foregoing, was held admissible. (54 Ill.2d 291, 299, 296 N.E.2d 731.) The court, holding that the defendant's due process rights were not violated because the jury had the opportunity to weigh the credibility of the witness' testimony, said:

> "The identification by the witness Lookanoff was indeed the result of suggestive questioning, but the entire process, suggestive questions and all, took place in the presence of the jurors, who were in a position to determine the weight to be given to the fact that the defendant was wearing glasses in the courtroom, the difficulty of the witness with the English language, and all other attendant circumstances. We do not agree that the identification was inadmissible." (54 Ill.2d 291, 299, 296 N.E.2d 731.)

The circuit court did not err in admitting Spencer's testimony.

[10] Defendant contends next that, in denying his motion for a mistrial or alternatively to exclude certain evidence, the circuit court denied him due process and violated his right of confrontation guaranteed under the sixth amendment to the United States Constitution. The record shows that the circuit court allowed defendant's pretrial discovery motion which requested, *inter alia*, the substance of any scientific tests or comparisons of the physical evidence obtained by the People. The People produced for defendant copies of three reports prepared by David Metzger, an employee of the crime laboratory of the Illinois Department of Law Enforcement. Metzger had examined certain objects found at the scene, including a shirt. He testified that the shirt was similar to one worn by defendant in a photograph taken the day of the murder. He testified, *inter alia*, concerning certain measurements made of the shirt. The reports, although describing other tests conducted, contained no mention of such measurements. Defendant argues that the incomplete response to discovery prejudiced his case and that the court erred in not granting his motion.

We are not here presented with a knowing failure on the part of the People to produce information which defendant was entitled to obtain on discovery. The record demonstrates that defendant received the verbatim reports which contained no mention of the measurements, and defendant does not contend that there were other reports. Assuming, *arguendo*, that the failure to furnish the information in some manner resulted in error, we hold it to be harmless. The jury saw the shirt and the photograph and heard the testimony of a witness who said the shirt was defendant's. The measurements added little to Metzger's testimony, and defendant does not point out in what manner the evidence was prejudicial. The evidence was not essential to support defendant's conviction, and absent a showing of prejudice, the error, if any, does not require reversal. *People v. Greer* (1980), 79 Ill.2d 103, 37 Ill.Dec. 313, 402 N.E.2d 203.

Defendant contends next that the People engaged in improper closing argument so inflammatory and prejudicial as to require reversal. Although we could hold that defendant's failure to object during the argu-

from the same physical act, he could be convicted of only one murder. (*People v. Szabo* (1988), 94 Ill.2d 327, 350, 68 Ill.Dec. 935, 447 N.E.2d 193; *People v. King* (1977), 66 Ill.2d 551, 566, 6 Ill.Dec. 891, 363 N.E.2d 838, *cert. denied* (1977), 434 U.S. 894, 98 S.Ct. 273, 54 L.Ed.2d 181.) We agree. When multiple convictions are obtained for offenses arising out of a single act, sentence may be imposed only for the most serious offense. (*People v. Mack* (1984), 105 Ill.2d 108, 127, 85 Ill.Dec. 281, 473 N.E.2d 880; *People v. Donaldson* (1982), 91 Ill.2d 164, 170, 61 Ill.Dec. 780, 435 N.E.2d 477.) In *Mack*, we found that, because it involves a more culpable mental state, intentional murder is a more serious crime than felony murder, and that therefore, upon affirmance of defendant's conviction for intentional murder, the other convictions had to be vacated.

[14] We do not agree with defendant that because the jury was allowed to consider the three felony-murder convictions he was denied a fair sentencing hearing. The fact that defendant could be sentenced to only one death penalty does not alter his conduct in the commission of the offense, and we fail to see how it could be prejudicial for the jury which found him guilty to know of the verdicts. In *Mack*, we rejected the contention that defendant was denied a fair sentencing hearing and affirmed the death sentence imposed. (*People v. Mack* (1984), 105 Ill.2d 108, 137, 85 Ill.Dec. 281, 473 N.E.2d 880.) We adhere to that holding here.

Defendant contends next that his death sentence must be vacated because the jury was erroneously permitted to consider as two aggravating factors the findings that defendant killed the victim in the course of committing other felonies, whereas as a matter of law there was only one such aggravating factor. The jury returned separate verdicts finding in one that the murder was committed while committing the offense of burglary with intent to commit theft and in the other while committing armed robbery. Defendant contends that, as the result of considering these as multiple statutory factors, the sentence of death was arbitrarily and capriciously imposed. Citing *People v. Brownell* (1980), 79 Ill.2d 508, 38 Ill.Dec. 757, 404 N.E.2d 181, he argues that, regardless of the verdicts, his conduct constituted only one aggravating factor. *Brownell* is clearly distinguishable. In *Brownell*, the defendant was convicted of intentional murder, aggravated kidnaping and rape. When imposing the death penalty, the circuit court found as an aggravating factor that the murder victim was killed because she was an eyewitness against the defendant. (79 Ill.2d 508, 514, 38 Ill.Dec. 757, 404 N.E.2d 181.) Despite the fact that the court upheld the finding that the murder was committed while committing the felonies of aggravated kidnaping and rape, the court vacated the defendant's sentence and remanded for a new sentencing hearing, holding, as a matter of statutory interpretation, that as a matter of law the killing of the victim could not be an aggravating factor.

We do not agree with defendant that the record shows that the jury considered the evidence as proof of multiple aggravating factors. The instruction given by the court states clearly that a finding that the murder was committed while defendant was committing another felony could be an aggravating factor, and we find no impropriety in the sentencing procedure.

We consider next defendant's contention that he was denied a fair sentencing hearing because the jury was permitted to consider improper nonstatutory aggravating factors, including unproved charges of previous prison escapes, repeated reference to his recent parole for an offense committed in a manner similar to the present one, testimony that an FBI "rap sheet" existed, and evidence of juvenile adjudications where evidence of nonstatutory aggravating factors was introduced during the sentencing hearing.

[15] This argument is without merit. A defendant is not prejudiced where, at a unitary sentencing hearing, the jury hears as evidence of nonstatutory aggravating factors a summary of defendant's past criminal conduct. (*People v. Brisbon* (1985), 106 Ill.2d 342, 365, 88 Ill.Dec. 87,

the death penalty and based upon the additional factors which are presented to you, in this long and extensive criminal history, certainly warrant if you so choose, a verdict which will sentence him to death."

He concluded that if the jurors "determine that the defendant is eligible [for the death penalty], * * * then you have to consider other factors in making this very big decision, and these are the factors." The evidence of defendant's extensive criminal history and violent lifestyle was, of course, properly considered, and we find no error which could result in prejudice to the defendant.

[18] We find without merit defendant's argument that the assistant State's Attorney improperly argued that the jury could not consider compassion or mercy for defendant. We agree with the People that defendant reads the prosecutor's argument out of context; when the State's Attorney told the jurors to disregard "sympathy and compassion for this person," he was arguing that they should not feel sympathy for defendant merely because he had chosen to defend himself, and because the jurors might be "irritable at some of the things" defendant or the People had done during trial. We conclude that the prosecutor's argument was not an attempt to misinform the jurors that they could not consider compassion as a mitigating factor.

[19] We also disagree with defendant that the prosecutor improperly argued that only the imposition of a sentence of death would be consistent with dignity and their personal commitment to the law, and that which is consistent with the dignity of the proper administration of the criminal justice system. We fail to find, as defendant urges, that such argument improperly incites the jury's passions, fears and emotions with the prosecutor's personal beliefs concerning the desirability of the death penalty. (*People v. Holman* (1984), 103 Ill.2d 133, 170, 82 Ill.Dec. 585, 469 N.E.2d 119.) In *Holman*, the prosecutor improperly argued that the jury must impose the death sentence rather than imprisonment in order to preclude defendant from killing prison guards or other innocent victims should he escape from prison. (103 Ill.2d 133, 162, 82 Ill.Dec. 585, 469 N.E.2d 119.) We distinguished prosecutorial argument which generally explains the deterrence rationale behind the death penalty from prejudicial remarks directed at the particular defendant, and concluded only the latter type of argument was improper. (103 Ill.2d 133, 162, 82 Ill.Dec. 585, 469 N.E.2d 119.) The prosecutor's argument here was a permissible explanation of the deterrence rationale behind the death penalty, and was not so highly prejudicial as to require a new sentencing hearing.

Defendant next argues that the State's Attorney minimized the jury's function by suggesting that its decision was merely a "recommendation," and not a final judgment as to defendant's sentence. Defendant relies on *Caldwell v. Mississippi* (1985), 472 U.S. 320, 330, 105 S.Ct. 2633, 2640, 86 L.Ed.2d 231, 240. We find *Caldwell* to be inapposite. The prosecutor there argued that the jurors should not view themselves as the final arbiters of whether the defendant would die, because their sentence of death would be reviewed for correctness by the Mississippi Supreme Court. The Supreme Court found this argument to be reversible error because it took away from the jury the seriousness with which it should treat its power to determine the appropriateness of the death penalty. (472 U.S. 320, 330, 105 S.Ct. 2633, 2640, 86 L.Ed.2d 231, 240.) We find no such comment to have been made by the State's Attorney here, nor do we find his remarks to be "state-induced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court." (472 U.S. 320, 330, 105 S.Ct. 2633, 2640, 86 L.Ed.2d 231, 240.) Rather, the prosecutor did admonish the jury that it had "to decide what is the proper penalty that needs to be imposed." His further admonishments support this remark and in no way tend to shift the jury's responsibility as the sentencing authority.

[20] Defendant next contends that the circuit court's instruction at the sentencing hearing that the jury should not consider

tion 9–1(b) *et seq.* of the Criminal Code of 1961 from those persons convicted of murder and eligible for sentencing under the provision of chapter V of the Unified Code of Corrections (Ill.Rev.Stat.1981, ch. 38, par. 1005–1–1 *et seq.*). We do not agree. This argument fails to take into account the unique sentencing procedure afforded those defendants found eligible for the death penalty, the provision for a two-step sentencing process, and the consideration during the second phase of factors introduced as evidence in mitigation and aggravation. This procedure enables the sentencer to independently weigh these factors and, upon determining whether the mitigating factors outweigh the aggravating factors, decide if the death penalty will be imposed. This procedure enables the sentencer to weigh the individual characteristics of the offender an l determine his character. (*Lockett v. Ohio* (1978), 438 U.S. 586, 605–06, 98 S.Ct. 2954, 2965, 57 L.Ed.2d 973, 990.) Those defendants sentenced under the Unified Code of Corrections are not eligible for this special sentencing treatment. Therefore, because the two-stage sentencing determination does distinguish those persons eligible for death from those persons found guilty of murder, defendant's argument must fail.

For the reasons stated, that portion of the judgment based on the felony counts is vacated, and otherwise the judgment of the circuit court of Will County is affirmed. The clerk of this court is directed to enter an order setting Wednesday, May 13, 1987, as the date on which the sentence of death entered in the circuit court of Will County is to be implemented. The defendant shall be executed by lethal injection in the manner provided by section 119—5 of the Code of Criminal Procedure of 1963 (Ill.Rev.Stat. 1983, ch. 38, par. 119—5). A certified copy of the mandate of this court shall be transmitted by the clerk of this court to the Director of Corrections, to the warden of Stateville Correctional Center, and to the warden of the institution wherein defendant is confined.

Affirmed in part and vacated in part.

Justice SIMON, dissenting:

The majority holds that the rule fashioned in *People v. Zehr* (1984), 103 Ill.2d 472, 83 Ill.Dec. 128, 469 N.E.2d 1062, requiring trial judges to probe potential juror biases, including biases against the presumption of innocence, does not apply to this case because the *voir dire* here occurred before this court's opinion in *Zehr* was filed. To reach this result, the court invokes *People v. Britz* (1986), 112 Ill.2d 314, 97 Ill.Dec. 768, 493 N.E.2d 575, which contained language suggesting that the *Zehr* rule would not be retroactive. In my view, *Britz* was fundamentally misguided when it was rendered, and subsequent developments in the law of retroactivity have fully illuminated the error this court fell into when it gave *Zehr* only prospective application.

The court's language in *Britz* concerning the retroactivity of the *Zehr* rule constituted no more than an advisory opinion; as the court recognized there, Britz himself would receive the benefit of the *Zehr* rule since we reversed his conviction on other grounds and remanded for a new trial. Indeed, the discussion of retroactivity in *Britz* was doubly unnecessary because the *voir dire* of which he complained occurred after the appellate court opinion in *People v. Zehr* (1982), 110 Ill.App.3d 458, 66 Ill. Dec. 155, 442 N.E.2d 581. The appellate court in *Zehr* had ruled, as we later agreed, that the trial judge should have questioned jurors as to their biases against the defendant's constitutional guarantees. *Britz* undercut the authority of the appellate court by failing to give prospective effect to the appellate court's opinion in *Zehr*.

The court commits the same error here. The defendant in this case was tried long after the appellate court had spoken in *Zehr*; in fact, the appellate court's opinion was handed down by a panel in the third district, the same district in which the trial court here sat. If the majority here is right, we should abandon what I understand is our accepted rule that trial judges are bound by the decisions of the appellate court.

earlier assertion that the two-step process is not an indispensable aspect of the system. If the two-step procedure is critical to the constitutionality of the statute, how can it logically be explained that the majority can find no error in the unitary proceeding conducted here?

Finally, for the reasons set forth in my separate opinions in *People v. Lewis* (1981), 88 Ill.2d 129, 179, 58 Ill.Dec. 895, 430 N.E.2d 1346 (Simon, J., dissenting), in *People v. Silagy* (1984), 101 Ill.2d 147, 184, 77 Ill.Dec. 792, 461 N.E.2d 415 (Simon, J., concurring in part and dissenting in part), and in *People v. Albanese* (1984), 104 Ill.2d 504, 549, 85 Ill.Dec. 441, 473 N.E.2d 1246 (Simon, J., concurring in part and dissenting in part), I believe that the Illinois death penalty statute is unconstitutional and that the death sentence in this case should be vacated. See also *United States ex rel. Lewis v. Lane* (C.D.Ill.1987), 656 F.Supp. 181, 195 (expressing "grave doubts" over the constitutionality of the Illinois death penalty statute).

KEY NUMBER SYSTEM

APPENDIX C

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August 6, 1987

State Appellate Defender
First Judicial District
100 W. Randolph, Suite 5-500
Chicago, IL 60601

ATTN: Charles Hoffman

THE COURT HAS TODAY ENTERED THE FOLLOWING ORDER IN THE CASE OF:

No. 59908 - People State of Illinois, appellee, v. Donald R. Lego, appellant.

The motion by appellant to vacate this court's order of June 5, 1987, denying rehearing and to retain jurisdiction of this cause is allowed.

JH:sdl

cc: AG/Crim
SA/Will
SAD/SCU (Charles M. Schiedel)
Donald R. Lego

No._____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

DONALD R. LEGO, Petitioner

-vs-

PEOPLE OF THE STATE OF ILLINOIS, Respondent

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF ILLINOIS

NOTICE AND PROOF OF SERVICE

TO: Honorable Joseph F. Spaniol, Jr., Clerk of the Supreme Court of the United States, 1 First Street N.E. Washington, D.C. 20543; Mr. Edward Masters, State's Attorney, 14 W. Jefferson Street Joliet, Illinois 60431; Neil F. Hartigan, Attorney General 100 W. Randolph, 12th Floor, Chicago, Illinois 60601; Donald R. Lego, Register No. 40953, Menard Correctional Center, P.O. Box 711, Menard, Illinois 62259

Please take notice that I have mailed the original and nine copies of the Petition for Writ of Certiorari to the Clerk of the above court and that I am serving the Attorney General and the State's Attorney each with three copies and I am serving the petitioner with one copy by depositing the copies in the mail in Chicago, Illinois, with sufficient prepaid postage and addressed as indicated above on this 16th day of August, 1988. All parties required to have been served have been served.

CHARLES HOFFMAN
Assistant Appellate Defender

SUBSCRIBED AND SWORN TO BEFORE ME
this 16th day of August, 1988.

JEWELLINE HOUSTON
Notary Public, State of Illinois
My Commission Expires

NOTARY PUBLIC